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Implied Warranty--Property--Vendor and Purchaser [*Mitchem v. Johnson*, 7 0hio St. 2d 66, 218 NE.2d 564 (1966)]

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tion in favor of the copyright owners,[69] but, hopefully, *United Artists* will provide the impetus for Congress to enact more definitive and equitable copyright legislation.

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IMPLIED WARRANTY — PROPERTY — VENDOR AND PURCHASER

Mitchem v. Johnson, 7 Ohio St. 2d 66, 218 N.E.2d 564 (1966).

The concept of an implied warranty has been referred to as a "freak hybrid born of the illicit intercourse of tort and contract."[1] Since the landmark opinion by Mr. Justice Cardozo in *MacPherson v. Buick Motor Co.*,[2] the doctrine has gained wide acceptance in the field of consumer products. The result has been to give the plaintiff added flexibility in bringing his cause of action. While at common law the plaintiff was required to prove both negligence and privity of contract, the theory of implied warranty has often allowed him to recover on the basis of strict liability.[3]

A great extension of the implied warranty doctrine in recent years has taken place in the area of realty. The Supreme Court of Ohio, however, in the case of *Mitchem v. Johnson*,[4] rejected the idea that a builder-vendor impliedly warrants that a residence he is constructing will be fit for its intended use. In *Mitchem*, the plaintiffs had purchased a lot and residence from the defendant-builder while he was in the process of completing the structure. The plaintiffs made no complaint about the builder's work in completing the house.[5] Although the facts were in dispute, the plaintiffs alleged the following defects: the building had been constructed on a low portion of the lot without foundation drainage tile to protect it from surface water problems; surface water had accumulated beneath the building, causing saturation of the roof supports, roof insulation, and the roof itself; the builder had used improper roofing, sheeting, and insulation; water seepage had caused the roof to

[69] In its brief on appeal, the defendant thoroughly discusses both the supposedly erroneous conclusions of Judge Herlands concerning the technology of CATV systems and of the analogous case law relied upon by the Judge. Brief for Defendant-Appellant, pp. 21-117, United Artists Television, Inc. v. Fortnightly Corp., No. 30767, 2d Cir., 1966.

warp and pull apart; and heavy rains and soil moisture had impaired the efficiency of the septic tanks, rendering certain toilet facilities unusable.[6] Affirmative defenses stating that modifications made by the plaintiffs were the proximate cause of the problems and that damages resulted from uncontrollable land conditions were denied.[7] The common pleas court instructed the jury to make its finding on the implied warranty by a builder, that he would complete the house "in such a way that it will be fit for its intended use and that the work would be done in a reasonably efficient and workmanlike manner."[8] The judgment for the plaintiffs was appealed by the defendant to the Lucas County Court of Appeals where it was reversed and remanded for a new trial on the grounds that the written instruction was improper and prejudicial.[9] The case was then certified by the court of appeals as being in conflict with *Vanderschrier v. Aaron*,[10] a case which held that a builder-vendor of an unfinished house impliedly warrants that the house will be completed so that it will be reasonably fit for its intended use and that the work would be completed in a workmanlike manner.[11]

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[1] Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1126 (1960).

[2] 217 N.Y. 382, 111 N.E. 1050 (1916).

[3] The development of the implied warranty was rife with problems as to requirements of privity, notice, and attempts at disclaimers. Strict tort liability has dispensed with these problems by failing to recognize any of them. Since none of these problems appear to have been raised in the implied warranty of realty cases to date, it seems that the courts have used implied warranty terminology to refer to strict liability. For the purposes of this article, the implied warranty to realty will be equated with strict liability.

[4] 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966).

[5] However, some of the defects actually occurred subsequent to the sale. The plaintiffs' fourth allegation shows that at the time of the sale, the septic tanks had not been installed, and the rough grading had not been undertaken. Record, p. 2, Mitchem v. Johnson, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966).

[6] 7 Ohio St. 2d at 67, 218 N.E.2d at 595-96.

[7] *Id.* at 68, 218 N.E.2d at 596.

[8] *Ibid.*

[9] *Ibid.* For a discussion of why the instruction was prejudicial see note 10 *infra.*

[10] 103 Ohio App. 340, 140 N.E.2d 819 (1957). In this case, the plaintiffs also purchased a partially completed house and after moving in, found that the sewer line which had been installed *after* the sale failed to carry sewage, causing the basement to become flooded and damaging furniture and carpeting.

In light of the above, it is not clear why the *Mitchem* appellate court found the instruction prejudicial. Either it felt that implied warranty was not the law in Ohio or it was concerned with the fact that the defect occurred prior to the sale in *Mitchem* and subsequent to the sale in *Vanderschrier.*

[11] *Id.* at 342, 140 N.E.2d at 821. From the facts in *Vanderschrier* as stated above the deciding court apparently viewed the implied warranty as attaching only to that portion of the house which was completed after the sale was made. The position of the

In affirming the appellate court's decision and remanding for further proceedings, the Ohio Supreme Court denied the validity of an implied warranty and instead upheld the builder's common law duty to build in a workmanlike manner and to use ordinary care and skill.[12] Speaking through Judge Schneider, the court relied upon the common law theory of caveat emptor and emphasized that the builder was not an insurer.[13] The decision was also based upon the proposition that when the finished product is realty, an agreement to furnish labor and materials is not a sale.[14]

The court's adherence to common law negligence in *Mitchem* is largely a result of a hesitancy to apply strict liability to the builder and to make him an insurer. Unfortunately, the court, in its most recent decisions, seems to have misunderstood the consequences of strict liability. In its reluctance to adopt this theory, it has readily relied on such standard formulas as res ipsa loquitur and negligence per se, in the belief that they differ from implied warranty as to burden of proof and available defenses.[15]

Although the form is somewhat different, the effect of res ipsa loquitur and strict liability is basically the same. Both permit the plaintiff to prove his case on what amounts to circumstantial evidence.[16] The actual negligent act of the defendant need not be proven. Under the res ipsa doctrine the injury or damage must be

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Ohio Supreme Court on the meaning of the word "completed" is confusing when it is noted that the holding in *Mitchem* seems to apply to the whole of the house — parts built before as well as after the sale — and that the court heard an argument based on implied warranty of fitness when the defects complained of occurred before the sale.

[12] 7 Ohio St. 2d at 73, 218 N.E.2d at 599.

[13] *Id.* at 70-72, 218 N.E.2d at 597-98.

[14] *Id.* at 69, 218 N.E.2d at 596-97.

[15] See Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966), a personal property case decided just prior to *Mitchem*, wherein a strong dissent written by Judge Taft and concurred in by Judge Schneider expressed the opinion that res ipsa loquitur obviated the necessity of an implied warranty. *Id.* at 242, 218 N.E.2d at 195. Furthermore, it was pointed out that the Ohio General Assembly had taken legislative action to protect the consumer, thus making certain acts negligence per se. *Id.* at 247, 218 N.E.2d at 198. Finally, the dissent left to the legislature the task of extending coverage of section 2-318 of the Uniform Commercial Code. *Id.* at 251, 218 N.E.2d at 200-01.

Strict liability as applied to the implied warranty area may well have arisen as a result of those situations which could not be proven even with the aid of res ipsa loquitur. Another consideration seems to have been the great public interest in human life, property, health, and safety which demanded greater protection. The supplier or builder, by placing his goods on the market, represented to the public that they were suitable and fit for use. Finally, the vendor or manufacturer was better able to spread the losses through higher prices and liability insurance. See Ashe, *So You're Going To Try a Products Liability Case*, 13 HASTINGS L.J. 66, 70-74 (1961); Prosser, *supra* note 1, at 1114-24.

[16] PROSSER, TORTS §§ 39, 97 (3d ed. 1964).

shown to have resulted from an instrumentality within the exclusive possession of the defendant.[17] In a sense, this is assumed in implied warranty cases, since the plaintiff need only prove that the injury or damage was caused by a defect which existed in the product when it left the control of the manufacturer or vendor.[18] However, the defendant, under either theory, has the same defenses available to him. Under res ipsa loquitur, he may show that the plaintiff was contributorily negligent or assumed the risk or that the defendant's act was not the proximate cause of the injury.[19] If strict liability is used, the defendant may show that his act was not the proximate cause or that the plaintiff was contributorily negligent or misused the product.[20] In both cases, the burden of proof is shifted to the defendant only where the evidence is more readily accessible to him. The overall burden of proof remains with the plaintiff, who must still prove the requisite proximate cause.[21]

Had the court in *Mitchem* allowed the plaintiff to try his case under the theory of implied warranty, the defendant-builder would have been able to escape liability by proving that modifications made by the plaintiffs were the proximate cause of the damage. Indeed, in those cases in which a builder has been held liable on the basis of an implied warranty of fitness, occupancy, or habitability,[22] the courts have refrained from making the builder an insurer by implying a warranty that the building be *reasonably* fit for

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[17] 9 WIGMORE, EVIDENCE § 2509, at 380-82 (3d ed. 1940). The following three requirements for res ipsa loquitur are set out: (1) the act must be one which would not have occurred without the negligence of someone, (2) it must be caused by an instrumentality exclusively in the control of defendant, and (3) the damage must not result from any voluntary act or contribution of the defendant. *Ibid.*

[18] Krupar v. Procter & Gamble Co., 160 Ohio St. 489, 494, 117 N.E.2d 7, 10 (1954).

[19] This necessarily is the converse of the third requirement of res ipsa loquitur. See note 17 *supra.*

[20] PROSSER, *op. cit. supra* note 16, § 78, at 539. Some courts, however, do not recognize contributory negligence as a defense, although they allow a showing of misuse in order to refute the defective condition. Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965).

[21] PROSSER, *op. cit. supra* note 16, §§ 40, 97.

[22] F & S Constr. Co. v. Berube, 322 F.2d 782 (10th Cir. 1963); Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963); Bethlahmy v. Bechtel, 415 P.2d 698 (Idaho 1966); Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958); Golin v. Sgrignoli, 83 Dauph. Co. Rep. 331 (1965); Miller v. Cannon Hill Estates, Ltd., [1931] 2 K.B. 113; Perry v. Sharon Dev. Co. [1937] 4 All E.R. 390 (Ct. App.). *Contra,* Berger v. Burkoff, 200 Md. 561, 92 A.2d 376 (1952); Shapiro v. Kornicks, 103 Ohio App. 49, 124 N.E.2d 175 (1955); Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978 (1959).

its intended use. Despite the wording of the issue by Judge Schneider in the *Mitchem* case,[23] the lower court had instructed the jury in terms of a warranty "*reasonably* fit for its intended use and . . . done in a *reasonably* efficient and workmanlike manner."[24] The *Vanderschrier* case[25] had found the builder to impliedly warrant the "completion of the entire house in such a way that it would be *reasonably* fit for its intended use . . . and that the work would be done in a *reasonably* efficient and workmanlike manner."[26] Certainly this "reasonable" warranty would allow for those defects which the *Mitchem* court says could not be avoided by the use of reasonable skill and prudence.[27] For example, in the *Mitchem* case, if the builder could have graded the lot, built a retaining wall, or furnished the drainage tile, it would seem reasonable that he breached an implied warranty of fitness for use by his failure to do so. The reasonable implied warranty thus has the effect of holding the modern-day builder to a degree of skill commensurate with the technological advances of the building trade. The finished product need only be reasonably fit for use rather than be absolutely perfect.[28]

The caveat emptor doctrine, to which the *Mitchem* court adhered, has been totally disgarded in the law of products liability. It is, in essence, a medieval English doctrine which places on the buyer the duty of discovering any defects in the goods.[29] The reasoning behind the doctrine was that the buyer and seller were on equal terms and that the purchaser had an opportunity to inspect the vendor's wares.[30] Therefore, a builder, lessor, or seller was liable only if he knew of the existence of a latent defect which he failed to disclose to the purchaser.[31] The burden of proof was placed on the plaintiff to establish privity of contract as well as the tort requirements of duty, breach, proximate cause, and damage. If the buyer was unable

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[23] Judge Schneider phrased the question involved as follows: "whether an implied warranty, in favor of the vendee of an uncompleted structure that it will, when finished, be suitable (and not merely reasonably so) for the purpose intended, should be imposed upon the vendor . . . ." 7 Ohio St. 2d at 68-69, 218 N.E.2d at 596.

[24] *Id.* at 68, 218 N.E.2d at 596. (Emphasis added.)

[25] Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957). For a discussion of the case, see text accompanying note 10 *supra.*

[26] *Id.* at 342, 140 N.E.2d at 821. (Emphasis added.)

[27] 7 Ohio St. 2d at 73, 218 N.E.2d at 599.

[28] Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 92, 207 A.2d 314, 326 (1965).

[29] Seavey, *Caveat Emptor as of 1960*, 38 TEXAS L. REV. 439, 441 (1960).

[30] Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 91, 207 A.2d 314, 326 (1965).

[31] Borggard v. Gale, 205 Ill. 511, 68 N.E. 1063 (1903).

to prove his case by this method or by fraud or misrepresentation as an alternative, the buyer was often left with a defective product and no adequate remedy.

Over the last twenty years, however, many courts seem to have entirely disgarded the doctrine of caveat emptor in cases similar to *Mitchem*.[32] Indeed the overall number of cases that have applied the doctrine has diminished,[33] undoubtedly because, with modern technological and scientific progressions in almost all industries, including the building trade, there is no longer an equality of bargaining power between the vendor and the purchaser. The balance has shifted in favor of the skilled craftsman who is more familiar with the highly mechanized component parts of a house than is the average buyer, who, more than likely, will purchase one new home in his entire lifetime.[34]

Another practicality that pursuaded the courts to disregard caveat emptor was the tremendous building boom following the Korean and Second World Wars.[35] The great demand for new housing and the shortage of supplies resulted in a scarcity of housing during the war years. With this shortage, the post-war builder was often able to erect hastily constructed prefabricated homes to meet the rising demand without fear of the buyer exercising his right of inspection and knowing that if defects were discovered after purchase, the doctrine of caveat emptor would be a bar to liability.[36] Two factors may create a similar situation in the near future. Tight mortgage money over the last year has limited the number of prospective purchasers and therefore the demand for housing. In addition, the war in Vietnam and inflation seemingly have begun to limit investment capital in general and investment in building more specifically. Should both elements terminate at once, the demand for housing could well exceed the supply, resulting in a favorable climate for the builder. With simple economics in his favor, the builder can well afford to resist the purchaser's request for an express warranty. In overlooking these practicalities, the *Mitchem* court has taken the position that, if insistent, the purchaser can se-

[32] Cases cited note 22 *supra.*

[33] 7 WILLISTON, CONTRACTS § 926A (3d ed. 1963).

[34] Kessler & Fine, *Culpa In Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 404 (1964). See Bethlahmy v. Bechtel, 415 P.2d 698, 710 (Idaho 1966).

[35] Bearman, *Caveat Emptor in Sales of Realty — Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 542 (1961).

[36] *Ibid.*

cure an express warranty.[37] This assumption raises the question of what constitutes insistence. Seemingly, an insistence requirement would complicate the commercial transaction by placing an added obligation on the purchaser to badger and argue with the builder in order to come to contract terms. In perspective, it would not be dissimilar to a lessee insisting on the exclusion of a disclaimer clause in a lease during a housing shortage. An insistence requirement would also clutter the courts with technicalities and require the jury to make an added determination.

The *Mitchem* case was also based upon the proposition that only if the finished product is personal property, will an agreement to furnish labor and materials be a sale and thereby carry with it an implied warranty of fitness.[38] The general rule has been that where a house and lot are purchased together, the contract of sale for the house becomes merged with the deed and thus bars an implied warranty.[39] A new trend, however, seems to make a distinction between the sale of land and an agreement to construct a building on the land.[40] Under this theory, in a case involving the sale of a lot and a contract to build a home, the latter, the court said, was a contract for work, labor, and materials, and was found to carry with it an implied warranty of fitness for human habitation.[41]

Adoption of this theory results in two extensions of the "reasonable" implied warranty of habitability. In the first place the buyer would have an action against the manufacturer of the materials as well as the builder. On the basis of this reasoning, the court, in *Spence v. Three River Builders & Masonry Supply, Inc.*,[42] permitted the plaintiff to recover on an implied warranty when his home collapsed due to the manufacturer's faulty cinder blocks. Secondly, it has been suggested that a provision similar to the implied warranty of fitness for a particular purpose in the Uniform Commercial Code

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[37] 7 Ohio St. 2d at 69, 218 N.E.2d at 596-97.

[38] *Id.* at 69, 218 N.E.2d at 598.

[39] Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108, 111-12 (1953); Note, *Implied Warranties in the Sale of New Houses*, 26 U. PITT. L. REV. 862, 863 (1965).

[40] F & S Constr. Co. v. Berube, 322 F.2d 782, 784 (10th Cir. 1963); Golin v. Sgrignoli, 83 Dauph. Co. Rep. 331 (1965); 7 WILLISTON, *op. cit. supra* note 33, § 926A, at 813.

[41] Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 833, 329 P.2d 474, 476 (1958).

[42] 353 Mich. 120, 90 N.W.2d 873 (1958).

(UCC) be enacted to protect the purchaser.[43] However, if a sale of an uncompleted building is a contract for work, labor, and *materials*, it may fall within the UCC itself. At the time of sale, the building materials are both identifiable and moveable goods as defined under section 2-105 of the Code. The builder is a seller of goods, and the purchaser is a buyer under section 2-103.[44] The buyer might find a remedy in section 2-315 which provides for an implied warranty of fitness for a particular purpose.[45] Furthermore, if a model were involved or if a description or architectural blueprint were offered by the builder, the vendee might recover on an express warranty of sample or description under section 2-313.[46] Perhaps he could also recover on an implied warranty of merchantability.[47]

The courts over the last two decades have made two major distinctions or classifications in applying the principle of implied warranties of habitability. The first class contains cases like *Mitchem*, in which the builder-vendor sells the lot and house while it is in the process of being completed. In the second class are the cases in which the builder-vendor sells both the lot and residence after the latter is completed. This classification process raises difficult questions of fact such as when is a house actually completed.[48] The practical rationale used by the courts for making the distinction between the two classes is generally that a house which is in the process of construction is more difficult to inspect than is one which is in its completed form.[49] The courts have therefore been more willing to apply the doctrine to the first class. Accordingly, it has been held in a number of jurisdictions that when a house is being constructed, the builder-vendor, at the time of sale, impliedly warrants that the house will be completed in a workmanlike manner

[43] Haskell, *The Case for an Implied Warranty of Quality in Sales of Property*, 53 GEO. L.J. 633, 651-52 (1965).

[44] Section 2-103(1)(a) states that the term "Buyer means a person who buys or contracts to buy goods." A seller, under § 2-103(1)(d) "means a person who sells or contracts to sell goods." UNIFORM COMMERCIAL CODE § 2-103.

[45] This section requires that the seller have reason to know of any particular purpose for which the goods are intended and that the buyer is relying on the seller's skill or judgement. This is almost always the case in building and construction contracts. See text accompanying note 34 *supra*.

[46] Under subsections (b) and (c) of this section, any description or model of the goods which is a part of the basis of the bargain becomes an express warranty. Comment 5 of § 2-313 suggests that this section is applicable to blueprints. See UNIFORM COMMERCIAL CODE §§ 2-313(b), (c) & comment 5.

[47] UNIFORM COMMERCIAL CODE § 2-314.

[48] 51 ILL. B.J. 498, 501 (1963).

[49] Miller v. Cannon Hill Estates, Ltd., [1931] 2 K.B. 113.

and will be reasonably fit for occupancy, habitability, or the use for which it was intended.[50] In light of this, it would seem that the *Mitchem* court has taken a step backward by refusing to recognize the trend toward the implied warranty.[51]

The second class of cases, those in which homes are sold after they have been completed,[52] are often analogized to the area of products liability law. For example, one authority has said that today's homes are composed of as many parts as a chattel, and as a result, the builder should be held to a stricter requirement of inspection.[53] Indeed, it is submitted that whether or not the defect has occurred before or after the house was sold should make no difference.[54]

The case which has most greatly extended the implied warranty is *Schipper v. Levitt & Sons, Inc.*,[55] decided by the New Jersey Supreme Court in 1965. *Schipper* arose when the infant son of the purchaser's lessee was injured by a defect in the hot water system installed by the builder. The court noted that Levitt, the builder,

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[50] Cases cited note 22 *supra.*

[51] This trend began with the adoption of English case law by the American courts. One of the earliest cases to adopt the English implied warranty was Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957), which was based upon Perry v. Sharon Dev. Co., [1937] 4 All E.R. 390 (Ct. App.). The year following *Vanderschrier,* the case of Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958), was decided on an implied warranty of fitness for habitation. This was followed by a Colorado case, F & S Constr. Co. v. Berube, 322 F.2d 782 (10th Cir. 1963), in which the court held that the home builder had breached an implied warranty of fitness in constructing the house. The opinion in *Mitchem* cites three cases, Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964), Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963), and Jones v. Gatewood, 381 P.2d 158 (Okla. 1963), which the Ohio Supreme Court distinguishes away merely by declaring that they involved undisclosed defects caused by the builder's negligence. 7 Ohio St. 2d at 71, 218 N.E.2d at 598. On the contrary, if the factual situations of these cases are scrutinized, it becomes clear that the plaintiffs would have found it difficult and perhaps impossible to win a judgment on the basis of pure negligence. Furthermore, the *Mitchem* court, by making this point, intentionally de-emphasizes the fact that all three were decided on the basis of an implied warranty. The most recent case to follow this relatively new rule of law is Bethlahmy v. Bechtel, 415 P.2d 698 (Idaho 1966), decided just fifteen days before *Mitchem.* Although the case was based upon both constructive fraud and an implied warranty, the court strongly advocated an implied warranty of fitness. *Id.* at 711.

[52] Carpenter v. Donohoe, *supra* note 51; Loraso v. Custom Built Homes, Inc., 144 So. 2d 459 (La. App. 1962); Loma Vista Dev. Co. v. Johnson, 177 S.W.2d 225 (Tex. Civ. App. 1943), *rev'd on other grounds,* 142 Tex. 686, 180 S.W.2d 922 (1944).

[53] Bearman, *supra* note 35, at 569.

[54] The distinction some courts continue to make is antiquated. The defect, for example, even in the case of the partially completed house, may not come to light until the purchaser has moved in or until the house has been exposed to the various weathering elements of the four seasons.

[55] 44 N.J. 70, 207 A.2d 314 (1965).

had assembled parts, including the water heater, in constructing the house in much the same manner as do manufacturers of automobiles and planes who have been liable to remote users.[56] A purchaser of a house, the court said, is no better able to protect himself in a deed than is the purchaser of a car when he receives his standard form bill of sale.[57] The New Jersey Supreme Court cited with approval the New York case of *Inman v. Binghamton Housing Authority*,[58] and joined with that court in agreeing with Dean Prosser's assertion that "there is no visible reason for any distinction between the liability of one who supplies a chattel and one who erects a structure."[59] As to a warranty making the builder an insurer, the *Schipper* court, juxtaposed to the position taken by the *Mitchem* court, explained that under the theory of warranty, the plaintiff must still prove proximate cause and damages. It must also be noted that the court applied the warranty to the entire house rather than to just the heater and emphasized:

> The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected . . . .[60]

In its reluctance to make the builder an insurer, the *Mitchem* court overlooked this sound precept.

The result in the *Schipper* case, as in others,[61] indicates a new tendency by the courts to widen the application of the implied warranty to realty. As evidenced by *Schipper*, the warranty runs not only to the purchasers of partially completed homes and newly completed homes but to their lessees as well. If the courts carry the reasonable implied warranty of suitability one step further, the purchasers of used homes might also be protected, subject to a short statute of limitations which would take depreciation into account.[62] An innovation in the relatively new area of poverty law might be achieved if the courts are willing to imply a warranty by the lessor that his tenement apartment is fit for habitation when the lessee

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[56] *Id.* at 82, 207 A.2d at 321.

[57] *Id.* at 92, 207 A.2d at 326.

[58] 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

[59] 44 N.J. at 84, 207 A.2d at 322, citing, PROSSER, TORTS § 85, at 519 (2d ed. 1955).

[60] 44 N.J. at 90, 207 A.2d at 325.

[61] Cases cited note 52 *supra.*

[62] Haskell, *supra* note 43, at 652.

rents it. This too could be subject to a statute of limitations commensurate with the type of lease. Instead of a statute of limitations, the courts might use the measure of a reasonable time under the circumstances and permit the landlord to introduce evidence proving that the apartment's substandard condition was due to the lessee's improper care. However, as evidenced by the *Mitchem* case, considerable time may elapse before such a utilization of the implied warranty is effectuated in Ohio.

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